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Supreme Court
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MICHAEL RODAK, JR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

DR. ELERY LAY, ET AL.,
Petitioners,

vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

DR. ELERY LAY, ET AL.,
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vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners Dr. Elery Lay, Rita Gloseclose, Thomas Hulse, and Katherine Reed[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 26, 1972, petition for rehearing denied on February 22, 1972. Upon granting of this petition, the Petitioners further respectfully pray that this Court summarily reverse the

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1. The Petitioners Gloseclose, Hulse and Reed are representatives of a class consisting of those duly registered voters in the City of Kingsport who voted for the Petitioner Dr. Elery Lay in May 1969 for a position on the Kingsport Board of Mayor and Aldermen (hereinafter referred to as "voter Petitioners").

judgment below with directions to reconvene a three-judge court to consider the merits of the Petitioners' constitutional claims. The decision below is so clearly out of line with applicable authority that oral argument is unnecessary in order to reverse and would be a wasteful expenditure of judicial energy.

The Respondents in this matter are the City of Kingsport, Tennessee, Charles K. Marsh, City Manager of the City of Kingsport, E. Lester Shelor, Recorder-Treasurer of the City of Kingsport, Dr. Ralph E. Evans, Superintendent of Schools of the City of Kingsport, John E. Faust, President of the Board of Education of the City of Kingsport, Winfield Dunn, Governor of the State of Tennessee and David M. Pack, Attorney General for the State of Tennessee, and all assistants and successors in office of those persons.

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Tennessee, Northeastern Division, granting the Petitioners' Motion for a Temporary Restraining Order and determining that the "issue between these parties is substantial", is attached hereto as Appendix C (page A9) and is not yet reported. The opinion and order of the United States District Court for the Eastern District of Tennessee, Northeastern Division (Three-Judge Court), dissolving itself on the grounds that the file presented no substantial federal claims is attached hereto as Appendix B (page A8) and is not yet reported. The opinion of the United States Court of Appeals

for the Sixth Circuit, which affirmed the order of the Three-Judge District Court, and the opinion of Circuit Judge McCree of that Court, concurring in part and dissenting in part, are reported in 454 F.2d 345 (6th Cir. 1972), and are attached hereto as Appendix A (page A1).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 26, 1972. A timely petition for rehearing was denied on February 22, 1972, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The Petitioners have challenged the constitutionality of certain Tennessee statutes and a Kingsport city ordinance which bar a person from contracting with or having any direct or indirect interest in any contract with a municipal corporation during the time that such person is an officer of or holds office under such municipal corporation. The question presented is:

Whether the Petitioners' claims that the provisions challenged, which effectively prohibit the Petitioner Lay from holding his duly elected public office and which thereby deny the voter Petitioners the right to be represented by the candidate of their choice, infringe in an impermissible manner upon the fundamental rights to freedom of expression and association guaranteed by the First Amendment and the guarantees of the Equal Protection Clause of the Fourteenth Amendment are so ob-

viously without merit or so foreclosed by previous decisions of this Court as to deny the Petitioners a hearing on the merits of those claims before a three-judge court?

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The principal constitutional provisions involved are the First, and Fourteenth Amendments to the Constitution of the United States.

The Tennessee statutes involved are the following:

T.C.A. 6-215. Restrictions on interest of officers.

> No officer in a municipality shall, directly or indirectly, be interested in any contracts to which the city is a party, or speculate in its bonds or warrants or other evidences of indebtedness; nor shall extra compensation be allowed, or extra pay granted, to any officer, agent, or servant of a municipality, or allowances made for discharge of extra duties.

T.C.A. 6-626. Contracts with officers prohibited.

> No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly.

T.C.A. 6-627. Liability of officer contracting.

> Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared

incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name.

The ordinance of the City of Kingsport, Tennessee, involved is the following:

Section 3, Article XX, Charter of Kingsport. Municipal officers, employees not to contract with city.

No member of the board of mayor and aldermen nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged.

STATEMENT OF THE CASE

For many years, the Petitioner, Dr. Elery Lay, has been a teacher employed by the City of Kingsport through its Board of Education. For the past several years, the Petitioner Lay has served as Assistant Superintendent of Kingsport City Schools, which position pays an annual salary in excess of $13,000.

In May 1969, the Petitioner Lay was duly elected by the voter Petitioners to serve as a member of the Board of Mayor and Aldermen of the City of Kingsport by the largest electoral vote ever received by a candidate for that office. He was sworn in as Alderman on July 1, 1969 and currently serves as Alderman, which position pays an annual salary of $250.

Shortly after his election, the courts of Tennessee interpreted the statutes and city ordinance challenged by the Petitioners to bar the Petitioner Lay from contracting with the City of Kingsport for a salary as Assistant Superintendent of City Schools or in any other capacity. See Opinion of Tennessee Court of Appeals, R., ...; Complaint, Appendix in R., pp. 10a-11a. Subsequently, the Kingsport Board of Education offered to sign a contract with the Petitioner, conditioned upon and effective as of the date of his resignation as Alderman, which resignation had to occur prior to December 31, 1970 or his renewal contract as Assistant Superintendent of City Schools would not be available. See Affidavit, Appendix in R., pp. 20a-21a; Complaint, Appendix in R., pp. 11a-12a.

On December 29, 1970, a complaint challenging the constitutionality of these provisions as applied to the Petitioners was filed in the United States District Court for the Eastern District of Tennessee, Northeastern Division. See Appendix in R., pp. 4a-18a. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1343(3) and §1343(4). At the same time the Petitioners also filed a Motion for a Temporary Restraining Order to restrain certain of the Respondents from requiring the resignation of the Petitioner Lay as a member of the Kingsport Board of Mayor and Aldermen as a condition for his continuing to serve as Assistant Superintendent of Schools. See Appendix in R., p. 19a. On December 30, 1970, District Judge Neese entered an opinion and order granting the temporary restraining order, until further orders. See Appendix C, *infra*. Since that time the Petitioner Lay has

performed and continues to perform the duties of Assistant Superintendent of City Schools but without a contract and without compensation.

The Complaint prayed for the convening of a three-judge court pursuant to Sections 2281 and 2284 of Title 28 of the United States Code. On January 6, 1971, acting pursuant to a request by District Judge Neese, Chief Judge Phillips of the United States Court of Appeals for the Sixth Circuit designated three judges to hear and determine this action. Subsequently all of the Respondents filed Answers. See Appendix in R., pp. 27a-40a. On February 2, 1971, the District Court of three judges dissolved itself without a hearing and the benefit of briefs on the ground that the file presented no substantial federal claim requiring a hearing and determination by a three-judge court and remanded the action to the United States District Court for Eastern District of Tennessee, Northeastern Division, for further proceedings. See Appendix B, *infra*. On the same day, an order was entered in that district court revoking the previously granted temporary restraining order.

On February 10, 1971, the Petitioners filed a Notice of Appeal from the order of the Three-Judge Court dissolving itself. A hearing was held in the Court of Appeals for the Sixth Circuit on October 14, 1971; and on January 26, 1972, a judgment was entered affirming the order of the Three-Judge Court. See Appendix A, *infra*. The majority held that the State of Tennessee and the City of Kingsport could properly adopt the provisions in question for the purpose of preventing an individual from holding

public offices which would create a conflict of interest and that no purpose would be served by remanding the case to the Three-Judge Court for consideration of the Petitioners' claims. Circuit Judge McCree dissented stating that he would reverse and remand to the Three-Judge Court for a hearing on the merits of the constitutional claims. Judge McCree contends that the majority erroneously rendered a decision on the merits of the Petitioners' claims, rather than considering merely the threshold question of substantiality, which was the sole issue before the Court.

REASONS FOR GRANTING THE WRIT

1. Both the Petitioner Lay and the Voter Petitioners Present Important Questions Not Settled by This Court.

The Petitioners challenge certain conflict-of-interest provisions which as interpreted by the courts of Tennessee effectively deny thousands of its citizens the right to participate in the political life of their communities at the most fundamental levels—those of seeking and holding public office and of effective exercise of franchise. Every person employed by a local municipality—from the high school civics teacher to the city garbageman—is effectively prevented from holding public office in that municipality by these provisions which require such persons to sacrifice the salaries of their regular livelihood for the nominal salary of public office. Such provisions have an equally severe impact on the voters of that municipality by substantially limiting the field of candidates from whom the voters might choose and as in this case by denying the voters the service of the candidate they duly elected.

The importance of such restrictions on the political activities of the public employee is accentuated by the continuous growth of all government with its vast number of regulatory, administrative and advisory agencies, and by the natural scarcity of qualified persons willing to serve as public officials, especially on the local level. The significance of this problem was well stated by the Supreme Court of California in striking down a similar restriction on the political activity of an employee of a municipal agency:

> "In summary we note that the expansion of government enterprise with its ever-increasing number of employees marks this area of the law a crucial one. As the number of persons employed by government and governmentally-assisted institutions continues to grow, the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it. Restriction on public employees which, in some or all of their applications, advance no compelling public interest commensurate with the waiver of constitutional rights which they require imperil the continued operation of our institutions of representative government." *Bagley* v. *Washington Township Hospital District,* 55 Cal. Rptr. 401, 421 P.2d 409, 417 (1966).

See also *Hobbs* v. *Thompson,* 448 F.2d 456, 471 (5th Cir. 1971).

The harmful effect of this type of restriction is particularly felt in smaller communities, where teachers, as a class, are often some of the most influential and knowledgeable citizens available for public service. See *Pickering* v. *Board of Education,* 391 U.S. 563, 571-72 (1968); *Mont-*

gomery v. *White*, 320 F.Supp. 303, 304 (E.D.Texas 1969). For example, no one doubts that Dr. Lay, having lived in Kingsport for many years and taught thousands of its citizens, would be a valuable public official of unquestionable integrity. Certainly his receiving the largest vote ever for his office is a tribute to the confidence of his fellow citizens. Yet his interest in serving and their confidence in him are totally frustrated by the provisions in question. Restrictions which deprive a community of the political participation and interests of persons such as Dr. Lay must be finely tailored to meet the specific state or municipal interest to justify such a violent intrusion on such fundamental freedoms.

That these provisions in question are not in any manner "finely tailored" is evidenced by the fact that their restrictions apply to far more individuals than public employees. In fact, it has been stated that if these provisions were ever enforced to the letter, the City of Kingsport would go out of business, as few individuals could afford or would be willing to serve in public office. Editorial, *Kingsport Times-News*, February 14, 1971, Appendix D, *infra*, p. A14. A literal interpretation would, it is suggested by that editorial, prohibit a person who owned stock in General Electric from serving in public office unless he sold his stock since the City buys light bulbs from that company. It is obvious that no effort has been made to tailor this legislation so as to consider the significance or the remoteness of the alleged conflict of interest.

Inherent in our system of representative government is the assumption that political expression and service

must be protected as the means of channeling conflict resolution into the political arena, thereby avoiding other destructive forms of conflict. Denying public office to thousands of well qualified individuals as well as denying to many more the opportunity to vote for a candidate of their choosing surely erodes this basic foundation of our system. These fundamental freedoms of seeking and holding public office and of exercising effective franchise must be protected from state restrictions other than those finely tailored to serve a compelling government interest.

This Court has often indicated the importance of closely scrutinizing state restrictions of this nature. See, *e.g., Dunn* v. *Blumstein,* 92 S.Ct. 995 (1972); *Bullock* v. *Carter,* 92 S.Ct. 849 (1972); *Turner* v. *Fouche,* 396 U.S. 346 (1970); *Williams* v. *Rhodes,* 393 U.S. 23 (1968). Yet no decision of this Court to date has involved the type of conflict-of-interest legislation imposed by the State of Tennessee and the City of Kingsport and it is of utmost importance that the extent to which a state may constitutionally legislate in this area be settled.

2. Both the Petitioner Lay and the Voter Petitioners Present Substantial Federal Constitutional Questions Requiring a Hearing by a Three-Judge Court.

The sole question before the Court below was whether the claims of the Petitioners present substantial federal constitutional questions requiring determination by a three-judge court.

This Court in *Ex Parte Poresky,* 290 U.S. 30, 32 (1933), established a two-pronged test for a court to follow in determing this question:

> "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' "

A court in applying this test may not permit its personal reactions as to the merits of the claims presented or the novelty of arguments presented it to enter into its decision, as the Court does not sit to determine whether the constitutional claims are good or bad on the merits. *Hargrave* v. *McKinney,* 413 F.2d 320, 328 (5th Cir. 1969). Cf., *Schneider* v. *Rusk,* 372 U.S. 224, 225 (1963). Therefore, where constitutional questions are presented which are "fairly open to debate", a hearing on the merits of those claims before a three-judge panel cannot be denied. 290 U.S. at 32.

As the minority opinion states, the majority in the Court below must have concluded that the Petitioners' claims were "obviously without merit", since their opinion cites no decisions of this Court concerning the constitutionality of state conflict-of-interest statutes. Appendix A, *infra,* p. A6. It is respectfully submitted that recent decisions of this Court which stress the importance of close constitutional scrutiny of state restrictions on the seeking and holding of public office and on the exercise of effective franchise preclude the possibility of the Petitioners' claims being frivolous or obviously without merit.

The First and the Fourteenth Amendments guarantee the right to seek and hold public office without overly broad

and invidiously discriminatory restrictions by a state or municipality. This Court has established that a person has:

> "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Turner* v. *Fouche,* 396 U.S. 346, 362-63 (1970).

The provisions challenged here arbitrarily act to deny the Petitioner Lay his right to hold public office, a right freely enjoyed by those who do not fall within the proscribed category. The fact that the provisions do not flatly bar the Petitioner Lay from the Kingsport Board of Mayor and Aldermen, but rather force him to surrender his regular livelihood as a condition of his public service makes the impediment no less real and no more constitutionally permissible.

Similarly, the First and the Fourteenth Amendments guarantee the right to cast an effective vote for the representative of one's choice unburdened by overly broad and invidiously discriminatory restrictions by a state or municipality. It is well settled by recent decisions of this Court that the right to exercise one's franchise includes the right to cast one's vote effectively; i.e., for the candidate of one's choice. *Dunn* v. *Blumstein,* 92 S.Ct. at 1000; *Bullock* v. *Carter,* 92 S.Ct. at 856; *Williams* v. *Rhodes,* 393 U.S. at 30; *Moore* v. *Ogilvie,* 394 U.S. 814, 818 (1969). Restrictions which limit the field of candidates from whom voters might choose are surely limitations on the right to cast one's vote effectively and must be closely scrutinized.

The effect of these restrictions, as those in *Bullock* were, is real and appreciable. A large segment of the community, including all teachers in the municipal school system, is effectively denied access to a place on the ballot, no matter how qualified they might be or no matter how broadly based their popular support is. By so denying them the opportunity to vote for candidates who represent their views these provisions in question have infringed severely upon the fundamental rights of the voter Petitioners.

Any abridgement of the fundamental rights to seek and hold public office and to exercise effective franchise must survive close constitutional scrutiny, and the state has a heavy burden of justifying by proof of a "compelling interest" any restraints on those precious rights. Recent decisions of this Court in the *Dunn* and *Bullock* cases clearly establish that the "compelling interest" test applies in testing the restrictions on the rights of the voter Petitioners. This Court has not yet addressed itself to the question of whether this strict standard of review must be applied in testing restrictions upon the right to hold public office, and declined specifically to make such a determination in *Turner* v. *Fouche, supra,* though holding there that "more finely tailored" means had to be adopted by the State. Yet surely it would be incongruous to apply one test when an action is brought by the potential candidate himself, and another test when the action is brought by voters seeking to vote for that same candidate. Moreover, in light of the recent *Dunn* and *Bullock* decisions applying the strict standard and indicating that "the rights of voters and the rights of candidates do not lend themselves to neat

separation", it seems clear that the strict standard should be applied.

In the present case, the provisions involved are unnecessarily and unreasonably broad in their attempt to achieve their purpose, and cannot survive the applicable standard of review, even if this Court were to apply that standard used in the *Turner* case. The only potential conflict noted by the majority in the Court below is that of the Petitioner Lay voting approval or disapproval of his own salary and such a conflict clearly can be handled by means more finely tailored than the total prohibition of persons, such as Dr. Lay, from holding public office.

Under these principles set forth by this Court, the Petitioners' claims cannot be said to be frivolous or obviously without merit. Indeed, the Court below did not specifically so hold, but concluded that "the State of Tennessee and the City of Kingsport may properly adopt statutes and ordinances for the purpose of preventing an individual from holding public offices which would create a conflict of interest". Appendix A, *infra,* p. A6. As the minority states, the effect of such a conclusion is to render a decision on the merits, and not on the jurisdictional question before the Court. Appendix A, *infra,* pp. A6-A7.

In support of their conclusion, the majority relies exclusively on *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and three other lower court decisions which the majority thought involved challenges "similar" to those of the Petitioners. That the majority below went beyond merely considering whether the constitutional questions before them were "obviously without merit" is evident from

the fact that in each of the three lower court decisions cited by the majority a three-judge panel *was* convened and heard the *merits* of those "similar" constitutional claims. See *Stack* v. *Adams,* 315 F.Supp. 1295 (N.D.Fla. 1970); *Deeb* v. *Adams,* 315 F.Supp. 1299 (N.D.Fla. 1970); *Wisconsin State Emp. Ass'n* v. *Wisconsin Natural Resources Board,* 298 F.Supp. 339 (W.D.Wis. 1969).

Moreover, even the *Mitchell* decision is not authority which would cause the Petitioners' claims to fail the substantiality test of *Poresky.* In *Mitchell,* this Court in a 4-3 decision upheld restrictions on certain political activities by federal officers and employees as set forth in the Hatch Act (5 U.S.C. §§ 7321-7327). That act, unlike the statutes and ordinances in question, is aimed only at active participation in partisan politics, and in fact expressly permits a covered employee to be an independent candidate in certain partisan elections, and all non-partisan elections. 5 U.S.C. § 7326. The Hatch Act deals narrowly with a Congressional interest in across-the-board "neutrality", which Congress balanced with the right to engage in political activity; whereas the provisions in question in dealing with potential conflicts of interest fail to accommodate in any way the fundamental right to engage in political activity. It is obvious that, unlike the Hatch Act and the *Mitchell* case which interprets it, no attempt has been made to tailor the legislation in question to infringe upon as few rights as possible. Such infringement where unnecessary and not achieved with narrow specificity raises substantial constitutional questions, none of which were involved in the *Mitchell* case.

In addition, the *Mitchell* case has no application whatsoever to those substantial constitutional rights of the voter Petitioners. The recent *Dunn* and *Bullock* decisions of this Court have explicitly recognized that the voters themselves have substantial rights to be protected apart from those with the candidate. The majority below totally ignores these separate and substantial rights, which in themselves present substantial questions for resolution by a three-judge court. The *Mitchell* decision certainly cannot be said to render those rights "obviously without merit."

Further evidence of the substantiality of the Petitioners' claims is the fact that three-judge panels have been convened and have heard almost identical challenges in other cases. In addition to the three cases cited by the majority below, three-judge panels heard similar claims in *Wilson* v. *Moore,* Civil Action No. 72-6-F (D.Ct.W.Va. 1972); and *Wetherington* v. *Adams,* 406 F.2d 724 (5th Cir. 1969). Moreover, despite the existence of *Mitchell,* three-judge courts have even heard the merits of challenges to the Hatch Act. See, e.g., *National Association of Letter Carriers, AFL-CIO, et al.* v. *United States Civil Service Commission,* Civil Action No. 577-71 (D.D.C. March 18, 1971); *Fishkin* v. *United States Civil Service Commission,* 309 F.Supp. 169 (D.D.C. 1969).

In failing to limit their decision to the jurisdictional issue of substantiality and remanding the case for a determination of the merits by a three-judge panel, the Court below has effectively foreclosed any possibility of the Petitioners formulating a record on the merits of their claims,

unless this Court deals with these issues now and summarily reverses the decision below. It is clear that the range of permissible restrictions on the fundamental rights of the Petitioners is a matter of degree and to render a sound decision on the merits a court must balance the state's and municipality's interests and the fundamental freedoms of its citizens. Thus, the ability of the Petitioners to introduce evidence as to the extent of those interests is critical. For example, in a trial on the merits, since the Petitioner Lay has continued to serve in a dual capacity (although receiving no salary as Assistant Superintendent of Schools) for the past two years, statistics with respect to the number of actual conflicts which have arisen could be introduced, plus other evidence to demonstrate that other less drastic means exist which would fully protect the state's and municipality's interest. Unless this Court acts upon this petition, such evidence is effectively barred from presentation, thereby precluding the development of any record on the merits.

CONCLUSION

For these reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit and that said judgment and opinion be summarily reversed with directions to reconvene the three-

judge court to consider the merits of the Petitioners' constitutional claims.

Respectfully submitted,

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APPENDIX A

No. 71-1210

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DR. ELERY LAY, ET AL.,
Plaintiffs-Appellants,
v.
CITY OF KINGSPORT, TENNESSEE, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court, Eastern District of Tennessee, Northeastern Division.

Decided and Filed January 26, 1972.

Before: MCCREE, BROOKS* and KENT, Circuit Judges.

KENT, Circuit Judge. This is an appeal from an order of a Three-Judge District Court, convened pursuant to the provisions of Title 28 U.S.C. §§ 2281 and 2284, dissolving itself on the ground that the suit in question presents no substantial Federal claim. The parties will be referred to as in the court below.

The order in question remanded the action to the United States District Court for the Eastern District of Tennessee, Northeastern Division for further proceedings. The plaintiffs are Dr. Elery Lay, Assistant Superintendent of Schools for the City of Kingsport, Tennessee, who is a duly elected Alderman for the City of Kingsport, Tennessee, and a class consisting of registered voters of the City of Kingsport, who in May, 1969, voted for Dr. Lay for Alderman.

*The concurrence of Judge Brooks, in this opinion, was received before his death, on December 30, 1971.

One of Dr. Lay's functions as Assistant Superintendent of Schools was the initial preparation of the annual school budget, including his salary as Assistant Superintendent. An Alderman for the City of Kingsport has the duty of voting approval or disapproval of the school budget, and also the duty of voting appropriation of public monies as required by the approved budget, including his own salary as Assistant Superintendent.

Shortly, after the election, at which Dr. Lay was elected as Alderman, the defendants instituted a declaratory judgment action in the Tennessee Courts to determine whether Dr. Lay could serve as both Alderman and Assistant Superintendent and receive salaries for services in each of such positions, in the light of the provisions of certain Tennessee Statutes[1] and an Ordinance[2] of the City

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1. *T.C.A. 6-215. Restrictions on interest of officers.*—

No officer in a municipality shall, directly or indirectly, be interested in any contracts to which the city is a party, or speculate in its bonds or warrants or other evidences of indebtedness; nor shall extra compensation be allowed, or extra pay granted, to any officer, agent, or servant of a municipality, or allowances made for discharge of extra duties.

"*T.C.A. 6-626. Contracts with officers prohibited.*—No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly."

"*T.C.A. 6-627. Liability of Officer contracting.*—Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name."

2. Code of Ordinances, Section 3, Article 20, of the City of Kingsport provides:

"Section 3, Article 20, Municipal officers, employees not to contract with the city.—No member of the board of mayor and alderman nor any officer or employee of the city shall be

of Kingsport. The Tennessee Court of Appeals, ... Tenn. App. ....., 459 S.W.2d 786 (1970), determined that under the provisions of the applicable Statutes and Ordinance there was a conflict of interest which prevented Dr. Lay from receiving any salary as Assistant Superintendent so long as he held the office of Alderman. Thereafter, the plaintiffs instituted the present action seeking an injunction to prohibit the defendants from applying the above cited Statutes and Ordinance, as required by the decision of the Tennessee Court of Appeals. The plaintiffs claim that the application of such Statutes and Ordinance resulted in their being deprived of rights conferred upon them by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The first issue presented is whether the order of the Three-Judge District Court dissolving itself is appealable to this Court. We conclude that it is. The Supreme Court of the United States has said in *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968), at 352:

> "The resulting situation is similar, we think, to that which results when a single judge declines to convene a three-judge court and denies relief: an appeal lies to the appropriate United States Court of Appeals, and not to this Court."

And again in *Mengelkoch* v. *Industrial Welfare Comm.*, 393 U.S. 83 (1968), at 83, 84:

> "Moreover, we have held that when, as here, a three-judge court dissolves itself for want of jurisdic-

---

connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged."

> tion, an appeal lies to the appropriate Court of Appeals and not to this Court."

and see also, *Mayhue's Super Liquor Store, Inc.* v. *Meiklejohn,* 426 F.2d 142 (5th Cir., 1970).

Thus, it is incumbent upon this Court to determine whether the Three-Judge District Court was presented with a substantial Federal question. The test for determining this issue has been set forth by the Supreme Court of the United States in *Ex parte Poresky,* 290 U.S. 30, 32 (1933), as follows:

> "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' "

This test has been applied by this Court recently. *Protestants and Other Amer. United, etc.* v. *United States,* 435 F.2d 627 (6th Cir., 1970), *Jones* v. *Branigin,* 433 F.2d 576 (6th Cir., 1970).

If the State of Tennessee and the City of Kingsport had authority to adopt the "conflict of interest" provisions set forth in the cited Statutes and Ordinance then no substantial Federal question is presented. The leading case in this area is *United Public Workers of America* v. *Mitchell,* 330 U.S. 75 (1947), which brought before the Supreme Court the constitutionality of certain provisions of the "Hatch Act" (18 U.S.C. § 61H, as amended, 18 U.S.C. § 61o) which prohibits officers and employees of the Executive Branch, with exceptions, from taking an active part in political

campaigns or the management of political activity. The Court recognized that the Act included a measure of interference with the freedoms of the civil servants involved, but further concluded that the Constitutional Rights asserted are not absolutes, and stated at page 103:

> "Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

Mitchell has recently been followed by other Courts when challenges similar to the one at hand have been asserted. In *Stack* v. *Adams*, 315 F. Supp. 1295 (N.D.Fla. 1970), an attack was made on a Florida Statute which required the resignation from state public office by a candidate for United States Representative. The Court decided that the Statute was not in violation of the First Amendment to the Constitution of the United States but held it invalid for other reasons. To the same effect is *Deeb* v. *Adams*, 315 F.Supp. 1299 (N.D.Fla. 1970) and *Wisconsin State Emp. Ass'n* v. *Wisconsin Natural Resources Bd.*, 298 F.Supp. 339 (W.D. Wisc. 1969). The District Court for the Western District of Wisconsin stated at page 350:

> "We conclude that the relinquishment of the right to run for partisan political office can constitutionally be made a condition of public employment."

In accord with the authorities cited this Court concludes that the State of Tennessee and the City of Kingsport may properly adopt Statutes and Ordinances for the purpose of preventing an individual from holding public offices which would create a conflict of interest. Having reached this conclusion we are satisfied that no purpose would be served by remanding the case to the Three-Judge Court for reconsideration of the issue of the substantiality of the questions presented in the first instance.

The order of the Three-Judge District Court dissolving itself is affirmed.

McCREE, Circuit Judge (concurring in part and dissenting in part). I agree with the majority that the dissolution order of the three-judge court is properly appealable to this court and that it is appealable at this stage of the proceedings. However, I would reverse that order and remand for the reconvening of the three-judge court to hear appellants' constitutional claims. The test for determining whether a constitutional question is sufficiently substantial to warrant the convening of three judges was stated by the Supreme Court in *Ex parte Poresky*, 290 U.S. 30, 32 (1933):

> The question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Since the majority cites no Supreme Court decision concerning the constitutionality of state conflict-of-interest statutes, the basis for its conclusion must be that the question presented here is "obviously without merit." Yet, the

majority finds it necessary to reason at some length by analogy to Hatch Act cases—including recent cases that, despite the controlling decision in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947) were considered by three-judge courts—in order to conclude that "no purpose would be served" by remanding this case for reconsideration by a three-judge court. It appears to me that the majority actually has rendered a decision on the merits of appellants' constitutional claims instead of considering merely the threshold question of substantiality, which is the only question presented to us in this appeal. The three-judge court gave no reasons for its determination that appellants' constitutional claims were insubstantial and cited only *Protestants and Other Americans United for Separation of Church and State* v. *United States*, 435 F.2d 627 (6th Cir. 1970), *cert. denied, sub nom. Protestants and Other Americans United for Separation of Church and State* v. *Donahey*, 403 U.S. 955 (1971), and *Jones* v. *Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied, sub nom. Jones* v. *Sullivan*, 401 U.S. 977 (1971), which are authority for only the proposition that a three-judge court is not properly convened if the constitutional question presented is insubstantial under the *Poresky* test. These cases did not discuss the considerations relevant to a determination that the constitutional claim is obviously without merit, nor did the court below state its reasons for so holding. Accordingly, I would remand with directions to reconvene the three-judge court either to consider the merits of appellants' constitutional claims or to explicate the reasons for its dissolution on the ground of insubstantiality.

APPENDIX B

Order

(Filed February 2, 1971)

This district court of three judges, having reviewed the file herein, is of the opinion that no substantial federal claim is presented requiring hearing and determination by such a court. *Cf. Protestants and Other Americans United for Separation of Church and State, et al.* v. *United States of America,* C. A. 6th (1970), ... F. (2d) ....., ... [decided and filed December 16, 1970]; *Jones* v. *Branigan,* C. A. 6th (1970), ... F. (2d) ....., ... [Decided and filed October 21, 1970].

The district court of three judges constituted herein therefore hereby is DISSOLVED, and this proceeding hereby is REMANDED to the United States District Court for the Eastern District of Tennessee, Northeastern Division, for further proceedings.

ENTER:

/s/ William E. Miller
(William E. Miller)
Circuit Judge

/s/ Robert L. Taylor
(Robert L. Taylor)
District Judge

/s/ C. G. Neese
(C. G. Neese)
District Judge

APPENDIX C

Memorandum Opinion and Order

(Filed December 30, 1970)

The plaintiffs seek an order to restrain temporarily the action of the defendants who are officers of the state of Tennessee in the enforcement or execution as to the plaintiff Dr. Elery Lay of T. C. A. §§ 6-215, 6-626, 6-627, for repugnance to the Constitution, First, Ninth, Fifth and Fourteenth Amendments. 28 U. S. C. §§ 2281, 2282, 2284 (3); Rule 65 (b), Federal Rules of Civil Procedure. The plaintiffs appeared before the Court through counsel on December 29, 1970, at which time all the defendants, except the defendants Honorable Buford Ellington, governor, and Honorable David M. Pack, attorney general, of the state of Tennessee, appeared specially through counsel. Counsel for the plaintiffs certified to the Court in writing the efforts which had been made to give the notice of such hearing to such unrepresented defendants. The plaintiffs, in a verified complaint, as well as through the affidavit of Dr. Lay, claim that immediate and irreparable damage, injury, loss or damage will result to Dr. Lay and his co-plaintiffs before all the adverse parties can be heard in opposition.

The plaintiffs allege that Dr. Lay is a duly elected and acting member of the board of mayor and aldermen of Kingsport, Tennessee and, by contract with the board of education of the City of Kingsport, Tennessee, the assistant superintendent of its schools; that they voted for Dr. Lay as a candidate for membership on such board of mayor and

aldermen and represent all members of that class of voters in such election, Rule 23, Federal Rules of Civil Procedure;. that Dr. Lay is being compelled by the defendant city's board of education to elect by December 31, 1970 whether he will continue to represent his coplaintiffs and the class they represent as such member of such board of mayor and aldermen, by declining a proffered contract as such city's assistant superintendent of schools, or resigning as such alderman and accepting such proffer of such contract; and, that it has been adjudicated by the Law Court, Kingsport, Sullivan County, Tennessee, as modified and affirmed by the Court of Appeals of Tennessee, Eastern Section, that, "• • • so long as Dr. Lay remains an Alderman he can not be paid by any sum as salary under any contract made with the Board of Education after the school year 1969-1970 • • •", *City of Kingsport, et al.*, appellees, v. *Dr. Elery A. Lay*, appellant, C. A. Tenn., opinion of June 15, 1970, certiorari denied Tennessee Supreme Court (1970).

In his supporting affidavit, Dr. Lay claims that, without the requested restraint, the plaintiffs will be damaged irreparably, in that should Dr. Lay elect to resign from his position as alderman, in the event he prevails herein, he would be barred from returning to that position without a special election or until the next general election, depriving his coplaintiffs of their right to be represented by an alderman of their electoral choice; whereas, should Dr. Lay elect to refuse the aforementioned proffered contract as assistant superintendent of schools, he will be irreparably damaged by the attendant loss of salary and the likelihood of his being replaced in such position, with an attendant loss of prestige as an educator.

The application of the plaintiffs for injunctive relief is addressed to the judicial discretion of the Court. *Deckert* v. *Independent Shares Corp.* (1940), 311 U.S. 282, 290, 61 S. Ct. 229, 85 L. Ed. 189, 195 (headnote 9). The purpose of the requested restraint is not to determine any controverted right but to prevent a threatened wrong or the doing of any act pending the final determination of the action, whereby rights may be threatened or endangered, *viz.*, to preserve the status quo. *Missouri-Kansas-Texas* v. *Brotherhood of Ry. & S. S. Clerks*, C. A. 7th (1951), 188 F. (2d) 302, 306 [5].

In this consideration, proper exercise of judicial discretion requires the weighing of the "* * * conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. * * * And it [the Court] will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon such payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. * * *" *Yakus* v. *United States* (1944), 321 U. S. 414, 440, 64 S. Ct. 660, 88 L. Ed. 834, 857 (headnote 16). "* * * When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion 'upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and

convenience generally.' * * *" *Perry* v. *Perry*, C. A. D. C. (1951), 190 F. (2d) 601, 602 [1]. It is serious error if the statutes complained of are unconstitutional as applied to Dr. Lay, and this Court has failed to grant preliminary restraint. The question before this Court now is, not whether the statutes complained of are constitutional or unconstitutional, but whether the showing of the plaintiffs has raised serious questions under the federal Constitution and Tennessee law and has disclosed that enforcement of the statutes, pending a final hearing, will inflict irreparable damages upon the plaintiffs. *Cf. Mayo* v. *Lakeland Highlands Canning Co.* (1940), 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774, 779 (headnote 1).

The issue between these parties is substantial and cannot be determined in advance of the trial of this action on its merits. Federal courts are reluctant to use the injunctive power to interfere with the conduct of state officers. But when there is a deprivation of constitutionally guaranteed rights, the duty of a federal court to exercise that power cannot be avoided. See *Dixon* v. *Alabama State Board of Education*, C. A. 5th (1961), 294 F. (2d) 150, certiorari denied (1961), 368 U. S. 930, 82 S. Ct. 368, 7 L. Ed. (2d) 193.

Applying these principles to the facts at hand, this Court, undertaking to balance the respective equities and probable damages to the plaintiffs and the defendants, is of the opinion that the potential harm to the plaintiffs is substantial and irreparable, if issuance of the restraint is erroneously withheld, while the potential harm to the de-

fendants is minimal, if the restraint should prove to be improvidently issued.

Accordingly, a temporary restraining order will issue enjoining, until further orders, each of the defendants, their agents, employees, subordinates, successors, and all persons in active concert with any of them, from enforcing and carrying into effect the mandate of the letter of December 1, 1970 of Dr. Ralph E. Evans, superintendent of schools of the defendant municipality, directed to the plaintiff Dr. Lay, in so far as same required Dr. Lay "* * * to elect either to continue in [his] office as Alderman or to accept an employment contract as Assistant Superintendent of Schools at the same salary but conditioned upon and effective as of the date of [his] resignation as a member of the [defendant City's] Board of Mayor and Aldermen * * *" by December 31, 1970: CONDITIONED on the plaintiffs' giving of security in the sum of ten thousand dollars ($10,000), for the payment of such costs and damages as may be incurred or suffered by any defendant who is found to have been wrongfully restrained. Rule 65 (c), Federal Rules of Civil Procedure.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

Issued December 30, 1970 at 11:19 o'clock, a. m.

APPENDIX D

Editorials

4-B KINGSPORT TIMES-NEWS Sunday, Feb. 14, 1971

CITY'S CHICKENS HOME TO ROOST

When Kingsport's aldermen challenged Elery Lay's right to serve on the city council while holding an administrative school position, they let the genie out of the bottle.

They'll have a hard time getting it back.

"Conflict of interest" questions have now been raised about Alderman Boots Duke, whose company's window glass wound up in the new fire hall, and Bays Mountain Park commissioner Harry Steadman, whose company bid for and won the contract to build the park's nature interpretive center.

We have no reason to believe that either of these officials did anything he shouldn't have done—or that Dr. Lay will do anything he shouldn't do if he wins his lawsuit.

If the truth were known, the charges and countercharges are more probably the result of factionalism than any disinterested concern for legality.

It's no secret that Assistant Superintendent Lay is no hero to the board of education which answers to the board of aldermen. And for all his disclaimers, Alderman Lay is the darling of a group of people who would like to see a new broom at both Dobyns-Bennett and City Hall. Duke and Steadman just got caught in the crossfire.

But the questions have been asked, and they will have to be answered.

Says the city charter:

"No member of the board of mayor and aldermen nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged."

The trouble with that statute is that if it were ever enforced to the letter, the city would go out of business.

There was a time when Kingsport was so small that public officials were bound to be involved in private businesses with which the city dealt. And at a later date, we're told, the city's official family was cozy enough to pass around contracts without even the formality of bidding.

Those days, we feel sure, are long gone.

But if public officials were literally barred from having "any interest in any contract," an alderman who owned stock in General Electric might be breaking the law every time the city bought a light bulb.

Neither city nor state law on the subject was designed to exclude a whole class of citizens—neither the teaching profession nor the business community—from participation in government.

The real test of conflict, it seems to us, is whether an official is actually in a position to influence decisions affecting his private income—and does exercise that influence.

An absolute prohibition of any potential conflict could result in wholesale resignations from the city's boards and commissions.

The community would be better served, it seems to us, if office-holders were required to abstain from decisions affecting their private interests—and if public bodies met openly enough to insure that they did.

Supreme Court, U. S.
FILED
JUN 21 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1534

DR. ELERY LAY, ET AL.,
Petitioners,

vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1524

DR. ELERY LAY, ET AL.,
Petitioners,

vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

In this Brief in Opposition to Petition for Certiorari, we shall refer to the Petitioner Lay and the Voter Petitioners, collectively, as the "Petitioner Lay"; and to the Respondents, City of Kingsport, Tennessee, and its officials, collectively, as "City of Kingsport".

QUESTIONS PRESENTED

Question Number One. Is a substantial federal question, requiring determination by a three-judge district court, presented by the Complaint wherein the Petitioner Lay seeks to enjoin the City of Kingsport from enforcing "conflict of interest" Statutes and a City Ordinance on the ground that the First and Fourteenth Amendments guarantee Petitioner Lay the right to contract with the City of Kingsport as Assistant Superintendent of City Schools while he serves as City Alderman, and to serve concur-

rently as Assistant Superintendent and City Alderman, when the duties of these two city offices admittedly involve a direct conflict of interest?

Question Number Two. Does the "anti-injunction" Statute (28 U.S.C. §2283) prohibit the District Court from granting the Petitioner Lay an injunction enjoining the City of Kingsport from enforcing a final judgment of the Tennessee Court of Appeals rendered against the Petitioner Lay in *City of Kingsport* v. *Lay*, ... Tenn. App. ....., 459 S.W. 2d 786 (1970), which case involved the same conflict of interest Statutes and Ordinance referred to in Question Number One above?

STATEMENT OF THE CASE

In the Petition for Certiorari, the Petitioner Lay omits any reference to the admitted direct conflict of interest between the duties of Petitioner Lay as an Alderman for the City of Kingsport and his duties as Assistant Superintendent of City Schools. The Petition also fails to refer to the prior State Court litigation between the City of Kingsport and the Petitioner Lay. The Respondents, in order to correct these omissions, adopt as their Statement of the Case the finding of facts by the United States Court of Appeals in this case, as follows:

> "* * * The plaintiffs are Dr. Elery Lay, Assistant Superintendent of Schools for the City of Kingsport, Tennessee, who is a duly elected Alderman for the City of Kingsport, Tennessee, and a class consisting of registered voters of the City of Kingsport, who in May, 1969, voted for Dr. Lay for Alderman. One of Dr. Lay's functions as Assistant Superintendent of Schools was the initial preparation of the annual school budget, including his salary as Assistant Superintendent. An Alderman for the City of Kingsport has the

duty of voting approval or disapproval of the school budget, and also the duty of voting appropriation of public monies as required by the approved budget, including his own salary as Assistant Superintendent.

"Shortly, after the election, at which Dr. Lay was elected as Alderman, the defendants instituted a declaratory judgment action in the Tennessee Courts to determine whether Dr. Lay could serve as both Alderman and Assistant Superintendent and receive salaries for services in each of such positions, in the light of the provisions of certain Tennessee Statutes and an Ordinance of the City of Kingsport.

"The Tennessee Court of Appeals, ... Tenn. App. ....., 459 S.W. 2d 786 (1970), determined that under the provisions of the applicable Statutes and Ordinance there was a conflict of interest which prevented Dr. Lay from receiving any salary as Assistant Superintendent so long as he held the office of Alderman. Thereafter, the plaintiffs instituted the present action seeking an injunction to prohibit the defendants from applying the above cited Statutes and Ordinance, as required by the decision of the Tennessee Court of Appeals. * * *" (App. A to Petition, pp. A1-A3)

The facts found by the United States Court of Appeals and quoted above are not in dispute. These facts are either admitted in the Complaint or have been judicially determined in the prior State Court litigation between these parties. A copy of the Complaint is attached hereto as Appendix A; and a copy of the Opinion of the Tennessee Court of Appeals in *City of Kingsport* v. *Lay*, ... Tenn. App. ....., 459 S.W. 2d 786, 787, 789 is attached hereto as Appendix B.

REASONS FOR DENYING PETITION FOR CERTIORARI

1. The constitutional questions presented by the Complaint are unsubstantial because "obviously without merit".

We respectfully disagree with the allegations in the Petition that the Tennessee conflict of interest Statutes, as interpreted by the Courts of Tennessee "effectively prohibit the Petitioner Lay from holding his duly elected public office" (See Petition, p. 3).

The Petitioner's First Amendment rights have not been denied. The Petitioner Lay has not been denied the right either to seek or hold public office. He engaged freely and actively in his political campaign for election as City Alderman. The Voter Petitioners voted for him in this election. He is serving today as City Alderman and has been so serving since the day he was sworn into office following his election. The opinion of the Tennessee Court of Appeals in *City of Kingsport* v. *Lay*, ... Tenn. App. ..... 459 S.W. 2d 786 (1970), denies no citizen the right to run for or serve as City Alderman. It merely holds that a City Alderman cannot contract with the City to hold a second City office, when the duties of the second City office involve a direct conflict of interest with the duties of a City Alderman.

We disagree with the statement that, as interpreted by the Tennessee courts, the Tennessee Statutes "effectively deny thousands of its citizens the right * * * of holding public office and of effective exercise of franchise". (See Petition, p. 8). The Tennessee Court of Appeals in *City of Kingsport* v. *Lay*, supra, expresses no opinion regarding the applicability of the conflict of interest statutes to any class of persons. The role which the Assistant Superintendent plays in initially fixing his own salary is the very basis of the opinion of the Tennessee Court. Ob-

viously, classroom teachers who have no function in fixing their own salaries are in a different class from that of Petitioner Lay. In view of the admitted conflict of interest present in this case, it is not necessary to speculate on what the Tennessee courts might hold in the absence of this fact. Certainly there are not "thousands" of Assistant Superintendents with the same duties as those of Petitioner.

Assuming that the action of the City of Kingsport in refusing to contract with Petitioner Lay as Assistant Superintendent is "state action" within the meaning of the Fourteenth Amendment, there is no denial of equal protection unless this action of the City constitutes "intentional or purposeful discrimination". In *Snowden* v. *Hughes,* (1943) 321 U.S. 1, 7-8, 88 L. Ed. 497, 502-503, 64 S. Ct. 397, this Court held that a candidate for state office may not claim a "denial of equal protection unless there is shown to be present * * * an element of intentional or purposeful discrimination. * * *" (321 U.S. 9-10, 88 L. Ed. 503). In *Turner* v. *Fouche,* (1970) 396 U.S. 346, 24 L. Ed. 2d 567, 90 S. Ct. 532, this Court held that a candidate for state office must be burdened with "invidiously discriminatory disqualifications" in order to constitute a denial of equal protection (24 L. Ed. at page 580).

There is no allegation that the City of Kingsport has contracted with other City Aldermen for their services in a second City office, the duties of which involve a direct conflict of interest. It is not alleged that the City has extended such a privilege to other citizens. No facts are alleged in the Complaint from which it might be inferred that either class or racial discrimination motivated the City in refusing to contract with the Petitioner Lay as Assistant Superintendent.

When tested by *Snowden* v. *Hughes* and *Turner* v. *Fouche*, the Complaint fails to present a substantial federal constitutional question based on the equal protection clause because it alleges no facts tending to show that invidious discrimination is involved in this case.

There are two additional decisions by this Court which, we submit, establish the lack of merit in the constitutional claims of the Petitioner Lay.

As pointed out in the Opinion of the United States Court of Appeals, the constitutionality of the Hatch Act, which prohibits most employees of the Executive Branch from taking part in political campaigns, was upheld in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947) (See App. A to Petition, pp. A4-A5). The reasoning of *Mitchell* is applicable to this case. The action of a City Alderman in contracting with the City for a second City office, involving a conflict of interest, would, we submit, in the words of *Mitchell* "* * * menace the integrity of the service * * * (and) * * * legislation to forestall such danger * * * is required. * * *" (330 U.S. at page 103). Conflict of interest statutes are the answer of the Legislature to this problem.

The purpose and compelling interest which prompted passage of the federal conflict of interest statute is discussed by this Court in *U. S.* v. *Mississippi Valley Generative Company*, (1961) 364 U.S. 520, 5 L. Ed. 2d 268, 81 S. Ct. 294, wherein it was stated that the federal statutes "were designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public" (364 U.S. at page 548, 5 L. Ed. 2d at page 287); and further that "the seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil." (364 U.S. at page 561, 5 L. Ed. 2d at page 295).

We respectfully submit that the Complaint presents no substantial federal question.

2. A Three-Judge Court is not required by 28 U.S.C. §2281 to determine matters of purely local concern.

28 U.S.C. §2281 provides in part as follows:

"An * * * injunction restraining the enforcement * * * of any State statute by restraining the action of any officer of such State in the enforcement * * * of such statute * * * shall not be granted * * *." (except by a Three-Judge Court).

By its terms, 28 U.S.C. §2281 applies only in those cases which seek an injunction restraining action of a State officer in the enforcement of a challenged State statute.

There is no allegation in the Complaint that the Governor or the Attorney General of Tennessee have taken any action in the enforcement of the Tennessee conflict of interest statutes. The Governor and Attorney General are nominal parties only (see Paragraphs 12 and 13 of the Complaint, Appendix A, pages B5-B6), and were entitled to notice of any hearing in this case under the provisions of 28 U.S.C. §2224(2).

The Petitioner Lay does not seek an injunction restraining the action of any officer of the State of Tennessee. He seeks to restrain the City of Kingsport from enforcing the challenged statutes "as interpreted by the Courts of Tennessee" in *City of Kingsport* v. *Lay*. As pointed out in Section 1 above, the Tennessee court's opinion is so narrowly limited by the facts of the case that it has in effect "only a local impact" on the City of Kingsport. The constitutional questions thus presented need not be determined by a Three-Judge Court. *Board of Re-*

gents v. *New Left Education Project*, ... U.S. ....., 30 L. Ed. 2d 697, 92 S. Ct. ..... (1972).

In *Moody* v. *Flowers*, (1967) 387 U.S. 97, 18 L. Ed. 2d 643, 647, 87 S. Ct. 1544, this Court said:

> "* * * The term 'statute' in §2281 does not encompass local ordinances or resolutions. The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer * * * unless he is functioning pursuant to a statewide policy and performing a state function. * * * Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. * * * And, the requirement that the action seek to enjoin a state officer cannot be circumvented 'by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute.' * * *"

We submit that a Three-Judge Court is not required to determine these purely local matters.

3. The Complaint shows on its face that Petitioner Lay seeks to enjoin the enforcement of a final state court judgment contrary to the anti-injunction statute (28 U.S.C. §2283).

In *Hill* v. *Martin*, 296 U.S. 393, 403, 56 S. Ct. 278, 282, 80 L. Ed. 293, this Court said:

> "The prohibition of Section 265 [28 U.S.C.A. §2283] is against a stay of 'proceedings now in any court of a state.'
>
> "That term is comprehensive. It includes all steps taken or which may be taken in the State Court or by its officers from the institution to the close of the

final process. It applies to Appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable, whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. * * *"

The Petitioner Lay seeks, in effect, a mandatory injunction directing the City of Kingsport to contract with the Petitioner Lay as Assistant Superintendent of Schools and pay him his salary while he continues to serve as City Alderman, notwithstanding the final judgment to the contrary rendered against Petitioner Lay in *City of Kingsport* v. *Lay*. Petitioner Lay litigated throughout the state courts of Tennessee his right to serve as Assistant Superintendent while also serving as City Alderman. All constitutional questions raised in this action could have been presented to the Tennessee courts. After a final adverse judgment, he now seeks to have the District Court review and reverse that state court judgment.

This Court has recently had occasion to re-examine the prohibition against enjoining State Court proceedings under the mandate of 28 U.S.C. §2283. In *Atlantic Coast Line R.* v. *Engineers*, 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970), this Court said:

"* * * It is settled that the prohibition of §2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding. Oklahoma Packing Co. v. Gas Co., 309 U.S. 4, 9, 84 L. Ed. 537, 539, 60 S. Ct. 215 (1940);

Hill v. Martin, 296 U.S. 393, 403, 80 L. Ed. 293, 298, 56 S. Ct. 278 (1935). * * *"

"* * * A federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. * * *"

We submit that the injunction sought in this case is not authorized by the anti-injunction statute.

CONCLUSION

For the reasons set forth herein, we respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

DR. ELERY LAY and RITA GLOSECLOSE, THOMAS HULSE, THOMAS RAMSEY, and KATHERINE REED, for themselves jointly and severally and for all others similarly situated with Plaintiffs Gloseclose, Hulse, Ramsey and Reed,

Plaintiffs,

v.

CITY OF KINGSPORT, TENNESSEE, a municipal corporation; CHARLES K. MARSH, City Manager of the City of Kingsport, Tennessee; E. LESTER SHELOR, Recorder-Treasurer of the City of Kingsport, Tennessee; DR. RALPH E. EVANS, Superintendent of Schools of the City of Kingsport, Tennessee; JOHN E. FAUST, President of the Board of Education of the City of Kingsport, Tennessee; BUFORD ELLINGTON, Governor of the State of Tennessee; DAVID M. PACK, Attorney General of the State of Tennessee; and all of their successors, agents, servants, employees, officers and deputies,

Defendants.

Civil No. 2637

COMPLAINT

1. This civil action is instituted to protect the constitutional rights of the Plaintiffs from the application of Sections 6-215, 6-626, and 6-627 of the Tennessee Code Annotated, and of Section 3, Article XX of the City of Kingsport Charter, which as interpreted by the Courts of Tennessee prohibit any person, including a teacher who contracts with a municipal corporation through its Board of Education, from contracting with or having any interest in any contracts with a municipal corporation during the time such person is an officer of or holds office under such municipal corporation. These statutes infringe upon the Plaintiffs' rights guaranteed by the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States and by Article IV, Section 2, Clause 1 and Article VI, Clause 2 of the Constitution of the United States. This action is for a Declaratory Judgment pursuant to 28 U.S.C. §2201, for injunctive relief pursuant to 28 U.S.C. §2202, 28 U.S.C. §1343(3) and 42 U.S.C. §1983, and for damages pursuant to 28 U.S.C. §1331.

2. Jurisdiction is conferred upon this Court as a three-judge tribunal pursuant to 28 U.S.C. §2281 and 28 U.S.C. §2284. This action seeks a declaration that certain state statutes of statewide applicability and a City Charter provision are unconstitutional as applied to these Plaintiffs and seeks injunctive relief to restrain Defendants from enforcing said statutes and charter provision in their capacities as state and local officers on the ground that said statutes and charter provision are unconstitutional as applied to these Plaintiffs.

3. The Plaintiffs, Rita Gloseclose, Thomas Hulse, Thomas Ramsey and Katherine Reed, bring this action on their own behalf and on behalf of all others similarly

situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the prerequisites for an action under Rule 23. The class consists of those duly registered voters in the City of Kingsport who voted for Dr. Elery A. Lay in May of 1969 for a position on the Kingsport Board of Mayor and Aldermen and who have been denied the right of political association and the right to full and effective political representation and participation by virtue of the intolerable burdens which T.C.A. §6-215, §6-626, and §6-627, and Section 3, Article XX of the Kingsport City Charter place upon Plaintiff Dr. Lay's right to hold the public office to which he was duly elected by the members of this class. The individual Plaintiffs named herein so voted for Dr. Lay to represent them as a member of the Kingsport Board of Mayor and Aldermen.

Members of the class are so numerous that joinder of all members as parties herein is impractical. But there are questions of law common to the entire class, without material factual differences. The claims of plaintiff, as representative of the class, are typical of the class, and he will fairly and adequately protect the interests of the class. There is no adversity of interest between plaintiff and any member of the class. Moreover, the prosecution of separate actions by individual members of the class, both now and in the future, would create a risk of inconsistent and varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for all of the parties. Furthermore, the party opposing the class has acted on grounds generally applicable to the class, and final injunctive and declaratory relief is therefore appropriate for the class as a whole.

4. The individual Plaintiffs, whose names are set forth in the caption, are citizens of the United States and residents of the City of Kingsport, Sullivan County, Tennessee.

5. The Plaintiff, Dr. Elery Lay, is a member of the Board of Mayor and Aldermen of the City of Kingsport, having been duly elected to that position in May of 1969. He also performs the duties of Assistant Superintendent in the City Schools of Kingsport, with the consent of the City Board of Education but without a contract for such position and without salary for reasons set out hereafter in the Complaint.

6. The Plaintiffs, Rita Gloseclose, Thomas Hulse, Thomas Ramsey and Katherine Reed, are duly registered voters in the City of Kingsport and voted for the Plaintiff, Dr. Elery Lay, to represent them as a member of the Kingsport Board of Mayor and Aldermen.

7. The Defendant, City of Kingsport, Tennessee, is a municipal corporation organized under the laws of the State of Tennessee. The City of Kingsport through its Board of Education operates the City School system and pays the salary of all persons employed in the School system as well as all members of its Board of Mayor and Aldermen.

8. The Defendant, Charles K. Marsh, is sued, with his assistants and successors in office, in his official capacity as City Manager of the City of Kingsport, Tennessee. The City Manager is charged under the Charter of the City of Kingsport with the duty to enforce the laws and ordinances of the City; to supervise and control the work of the City Recorder; to approve and certify the payment of creditors or officers and employees of the City

of Kingsport; to approve and sign all City checks for the payment of all personnel of the City including those of the Board of Education; and to sign and approve the checks for the payment of salaries for the members of the Board of Mayor and Aldermen of the City of Kingsport.

9. The Defendant, E. Lester Shelor, is sued, with his assistants and successors in office, in his official capacity as Recorder-Treasurer of the City of Kingsport. The City Recorder is charged under the Charter of the City of Kingsport with auditing all payroll accounts and claims against the City and is specifically charged with not approving or paying any amount claimed against the City unless authorized by law and ordinance.

10. The Defendant, Dr. Ralph E. Evans, is sued, with his assistants and successors in office, in his official capacity as the Superintendent of Schools of the City of Kingsport. The Superintendent of Schools is charged with the general duties of supervising the operation of the Kingsport City Schools and with the duties of lawfully employing teachers for the City Schools of Kingsport.

11. The Defendant, John E. Faust, is sued with his assistants and successors in office, in his official capacity as President of the Board of Education of the City of Kingsport. The President of the Board of Education is the chief officer of the Board. The President of the Board of Education and the Superintendent of Schools sign employment contracts with teachers and other personnel on behalf of the City of Kingsport.

12. The Defendant, Buford Ellington, is sued, with his assistants and successors in office and in his official capacity as the Governor of the State of Tennessee. The Governor is the chief executive officer of the State of

Tennessee and is charged under Article 3, Section 1 of the Constitution of the State of Tennessee with the general duties of enforcing the laws of the United States and the State of Tennessee.

13. The Defendant, David M. Pack, is sued, with his assistants and successors in office, and in his official capacity as Attorney General for the State of Tennessee. The Attorney General of Tennessee is chief legal officer of the State and is charged with, among other things, appearing for the State in the Tennessee Supreme Court, appearing for the State in any Court in the United States in which the State is a party, giving legal advice to various State Officials as required in their duties, and rendering written opinions to all Offices of the State when called upon.

14. The Defendants, Marsh, Shelor, Evans and Faust have their official place of business in Kingsport, Sullivan County, Tennessee. The Defendants, Ellington and Pack, have their official place of business in Nashville, Davidson County, Tennessee.

15. For many years, the Plaintiff, Dr. Elery Lay, has been a teacher with permanent tenure employed by the Board of Education of the City of Kingsport. In 1968, the Board of Education elected him Assistant Superintendent in the City Schools of Kingsport for the school year 1968-69 and on May 20, 1969, re-elected him to that position for the school year 1969-70. Dr. Lay was paid his full salary for both school years by the City of Kingsport. Since July 1, 1970, Dr. Lay has continued to perform the duties of Assistant Superintendent of Schools without a contract for such position and without his salary of $13,210 per year for reasons set out hereafter in this Complaint. In May of 1969, Dr. Lay was duly elected as a member of the Board of Mayor and Aldermen of the City of Kings-

port by the largest electoral vote ever received by a candidate for that office. He was sworn in as an Alderman on July 1, 1969, at an annual salary of $250.00 and currently serves as Alderman.

16. On June 18, 1969, the City of Kingsport, Tennessee, Defendants Charles K. Marsh and E. Lester Shelor, filed in the Law Court, Part I, at Kingsport, Sullivan County, Tennessee, a declaration for declaratory judgment under 23 T.C.A. §1103 against the Plaintiff, Dr. Elery Lay, Pennsylvania National Mutual Casualty Insurance Company, the surety on the bond of the City Recorder-Treasurer, and Aetna Casualty & Surety Company, the surety on the bond of the City Manager. The plaintiffs in that action sought a declaration as to whether or not certain state statutes and Kingsport City Charter would permit the City Manager and the Recorder-Treasurer to lawfully pay Dr. Lay two separate salaries for two separate positions, one as an Alderman, and the second as Assistant Superintendent of Schools. The declaratory judgment action sought a declaration of the rights of the parties under the following Sections of the Tennessee Code Annotated:

T.C.A. 6-215. Restrictions on interest of officers.—

No officer in a municipality shall, directly or indirectly, be interested in any contracts to which the city is a party, or speculate in its bonds or warrants or other evidences of indebtedness; nor shall extra compensation be allowed, or extra pay granted, to any officer, agent, or servant of a municipality, or allowances made for discharge of extra duties.

T.C.A. 6-626. Contracts with officers prohibited.—

No person holding office under any municipal corporation shall, during the time for which he was

elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly.

T.C.A. 6-627. Liability of officer contracting.—

Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name.

The declaratory judgment action also sought a declaration of the rights of the parties under the following Section of the Charter of the City of Kingsport:

Section 3, Article XX, Charter of Kingsport.

Municipal officers, employees not to contract with city.—

No member of the board of mayor and aldermen nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged.

17. In a declaratory judgment handed down by the Honorable Roger E. Thayer, Judge holding Law Court, Part I at Kingsport, Sullivan County, Tennessee, it was ordered that the plaintiffs in the declaratory judgment action could not lawfully pay to Dr. Lay any compensa-

tion for services performed as a teacher or as Assistant Superintendent of Schools in the Kingsport School System until such time as his term of office as Alderman expired or otherwise became vacant.

18. On appeal the Tennessee Court of Appeals held that so long as Dr. Lay remains an Alderman he cannot be paid any sum as salary under any contract made with the City of Kingsport after July 1, 1970, modifying the judgment of the Law Court by holding that Dr. Lay was entitled to both salaries for the school year 1969-1970.

19. A petition for writ of certiorari to the Supreme Court of the State of Tennessee filed on behalf of Dr. Lay was denied by the Supreme Court on November 2, 1970.

20. Since July 1, 1970, the Plaintiff, Dr. Elery Lay, has performed the duties of Assistant Superintendent of Schools of the City of Kingsport without a contract with the City for such a position and without compensation. The sole reason that the City through its Board of Education has refused to sign an employment contract with respect to such position and to pay Dr. Lay a salary for his services in such position is that the Defendants have been prohibited from so acting by the direction of the Courts of Tennessee that such a contract with or payment of salary to Dr. Lay would be in violation of the statutes and charter provision set out in paragraph 16 above as long as Dr. Lay remains a member of the Board of Mayor and Aldermen. The Board of Education of the City of Kingsport by letter from Defendant, Ralph E. Evans, Superintendent of Schools, dated December 1, 1970, has offered to sign a contract with Dr. Lay for the position of Assistant Superintendent of Schools at the salary of $1,125.84 per month, conditioned upon and effective as of the date of Dr. Lay's resignation as a member of the Mayor

and Board of Aldermen with such resignation occurring on or before December 16, 1970 (Later changed to read December 31, 1970, for the purpose of permitting the filing of this Complaint). Furthermore, the Defendant Evans has indicated that if Dr. Lay has not resigned from his duly elected position as a member of the Board of Mayor and Aldermen by December 31, 1970, Dr. Lay will at that time be required to physically vacate his office at the Board of Education and will be prohibited from performing the duties of Assistant Superintendent of Schools or as teacher in that his employment will be considered terminated as of July 1, 1970. In no event does the City or its Board intend to pay Dr. Lay any salary for the period from July 1, 1970, to the date he accepts the employment contract offered by letter from Defendant, Ralph E. Evans, dated December 1, 1970, or to the date he is prohibited from performing the duties of Assistant Superintendent of Schools, despite Dr. Lay having served in that capacity since July 1, 1970.

21. The application of the sections of the Tennessee Code set out in paragraph 16 above and the Section of the Charter of the City of Kingsport set out in paragraph 16 above, to the Plaintiff, Dr. Elery Lay, so as to prohibit him from serving in his duly elected position as an Alderman of the City of Kingsport and as Assistant Superintendent of Schools of the City of Kingsport at the same time and to prohibit him from drawing salaries in both such positions at the same time and the refusal of the Defendants, City of Kingsport, Marsh and Shelor to pay the Plaintiff, Dr. Lay, both of such salaries, and the refusal of the Defendants, City of Kingsport, Evans and Faust, to contract with Dr. Lay as Assistant Superintendent of Schools other than upon the condition that he resign his duly elected position as an Alderman are in-

consistent with the rights to freedom of speech, press, assembly and petition as guaranteed by the First and Ninth Amendments of the Constitution of the United States. The application of said statutes and charter by the Defendants further deprives Dr. Lay of liberty and property without due process of law and of equal protection of laws in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The actions of the Defendants under the statutes and charter set out above impose an intolerable and decisive burden upon Dr. Lay's right to seek and to hold public office.

The right to participate and engage in political activity by seeking and holding public office is the ultimate embodiment of the First Amendment rights of free speech, freedom of political association and freedom to petition the government for a redress of grievances. So fundamental is this right that it not only is protected by the First Amendment but also is reserved to the people by the Ninth Amendment. Surely no right is more precious in a free democratic country and to the legitimacy of representative government than that of participating and engaging in political activity which could hardly have meaning if destroyed at its most important stage—the point of seeking and holding public office.

The Supreme Court has often recognized that when fundamental liberties are at stake, a state must justify any classification which restricts those liberties as necessary to achieve a compelling state interest. Therefore, the Court must determine that the interests involved in the restrictions on Dr. Lay's rights to hold public office further legitimate state interest, that the interests involved are so compelling as to permit the resultant infringement on Dr. Lay's fundamental liberties, and that the means used to promote the interests involved are

narrowly enough drawn to meet the test of necessity. Neither the State of Tennessee nor the City of Kingsport has an interest that will justify this infringement of Dr. Lay's constitutionally protected rights and even if the State and/or City should have such an interest reflected in said statutes and charter, that interest is not compelling and could clearly be accommodated by more narrowly drawn legislation which would not so severely interfere with the constitutional rights of Dr. Lay by prohibiting his serving as a duly elected member of the Board of Mayor and Aldermen while serving as Assistant Superintendent of Schools and drawing salaries in both positions.

22. The enforcement of said statutes and charter infringes the right of the Plaintiffs Gloseclose, Hulse, Ramsey and Reed, and the members of their class to be represented, on the Board of Mayor and Aldermen of the City of Kingsport by the candidate voted for by them and elected overwhelmingly by the voters of Kingsport. The denial of the right of these Plaintiffs to be so represented violates their fundamental right to freedom of political association; to effective political representation; to due process of law; and to equal protection of laws, as guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The coalescence of the right of effective political representation and participation and the First Amendment right of political association was recognized by the United States Supreme Court in *Williams* v. *Rhodes,* 393 U.S. 23 (1968). The Court asserted that the fundamental right of political association for the advancement of political beliefs was illusory without the concomitant power to transform political beliefs into political acts through the voting process. Thus, if the right to vote effectively by

having the candidate duly elected serve his term of office without bearing unconstitutional burdens were not constitutionally guaranteed, the rights of speech, press, assembly, association and petition would be reduced by the states to a right to engage in a meaningless ritual of exercising the citizen's right to vote. It is abundantly certain that this fundamental right is infringed by the actions of the Defendants under the statutes and charter in question which will in effect deny the voters the service of the candidate of their overwhelming choice. Neither the state nor the City has an interest that will justify this infringement of the constitutionally protected rights of the Plaintiffs and members of their class. Furthermore, even should there be such an interest, that interest is not compelling and could be accommodated by more narrowly drawn legislation which would allow the effective political representation of the voters of Kingsport by permitting Dr. Lay to serve as an Alderman and as Assistant Superintendent of Schools and to draw salaries in both positions.

23. There is between the parties an actual controversy as stated herein. The Plaintiffs and members of their class are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. The Plaintiff, Dr. Lay, is and remains under a substantial disability in that he is receiving no compensation as Assistant Superintendent of Schools so long as he continues to hold his duly elected position as an Alderman of the City of Kingsport. The Plaintiffs, Gloseclose, Hulse, Ramsey and Reed, and members of their class are and remain under a substantial disability in that their right to representation by the candidate of their choice and of the choice of an overwhelming number of the citizens of Kingsport who voted in the

election for Aldermen is threatened by the actions of the Defendants in applying the statutes and charter to Dr. Lay. Unless the statutes and charter in question are declared unconstitutional as applied to Dr. Lay, and the Defendants restrained from requiring Dr. Lay to elect between serving as Alderman with an annual salary of $250.00 and serving as Assistant Superintendent of Schools with an annual salary of $13,210.00, Dr. Lay will be forced to refrain from performing the duties of Assistant Superintendent of Schools upon which his claim for salary is based. Moreover, unless the Defendants are restrained, Dr. Lay will be required to choose between his two positions, a choice which infringes on the right of both Dr. Lay and the other Plaintiffs to effective political representation and participation in the political process, and a decision which economically leaves him no choice but to resign from his duly elected position as a member of the City Board of Mayor and Aldermen. The Plaintiffs have no plain, adequate or complete remedy to adjust the wrongs and unlawful acts herein complained of other than this action for a declaration of rights and injunction.

WHEREFORE, PLAINTIFFS RESPECTFULLY PRAY that this Court take jurisdiction of this case, and that a special Three-Judge Court be called to hear and determine this cause as provided in 28 U.S.C. §2281 and §2284, and Plaintiffs further pray that the Court advance the case on the docket and order a speedy hearing thereof and upon such hearing adjudge, decree, and declare the rights and legal relation to the parties and declare the practice, policy, custom, or use of the Defendants, their officers, agents, servants, subordinates, employees, and those persons in active concert of participation with them to be in violation of the Constitution of the United States.

The Plaintiffs further pray that the Defendants, their successors, officers, servants, employees, or those persons in active concert of participation with them be permanently enjoined from the acts complained of and from depriving the Plaintiffs of their constitutionally protected rights of free speech, political association, expression, assembly, petition, due process, and equal protection of the laws.

Plaintiffs further pray that a preliminary injunction issue prohibiting the Defendants, Evans and Faust, from requiring the Plaintiff, Dr. Lay, to resign as an Alderman as a condition for his employment as Assistant Superintendent of Schools of the City of Kingsport and requiring the Defendants, City of Kingsport, Marsh and Shelor, to pay to Plaintiff, Dr. Lay, his salary as Alderman and as Assistant Superintendent of Schools so long as he holds both positions, pending a final hearing.

Plaintiffs further pray that the Defendants, City of Kingsport, Marsh and Shelor, pay to Dr. Lay the sum of $1,125.84 per month for each month from July 1, 1970, to the present for his services as Assistant Superintendent of Schools of the City of Kingsport.

Plaintiffs further pray that the Defendants be assessed for costs of the Plaintiffs.

Plaintiffs respectfully pray for such other, further or general relief to which they may be entitled.

/s/ James H. Cheek III
/s/ Charles K. Wray
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APPENDIX B

CITY OF KINGSPORT et al., Appellees.

v.

Dr. Elery A. LAY, Appellant.

Court of Appeals of Tennessee,

Eastern Section.

June 15, 1970.

Certiorari Denied by Supreme Court

Nov. 2, 1970.

Declaratory judgment action to determine whether defendant could receive compensation both as assistant superintendent of education and as alderman. The Law Court, Kingsport, Sullivan County, Roger E. Thayer, J., entered judgment and defendant appealed in error. The Court of Appeals, McAmis, P. J., held that notwithstanding charter and statutory provisions with respect to contracts between municipality and its officers, assistant superintendent of education who was elected alderman was entitled to salaries for both offices during term of contract, but could not receive salary as assistant superintendent if he continued to serve as alderman thereafter.

Judgment modified and affirmed.

1. Declaratory Judgment (Key) 209

Question of whether defendant could be paid by city for services both as alderman and assistant superintendent of education was determinable in declaratory judgment action. T.C.A. § 23-1103.

2. Quo Warranto (Key) 5

City which brought declaratory judgment action to determine whether defendant could be compensated both

as alderman and as assistant superintendent of education was not required to proceed by quo warranto.

3. Officers (Key) 30

Defendant's election as alderman did not abrogate contract previously entered into under which defendant served as assistant superintendent of education.

4. Municipal Corporations (Key) 227

Statutes relating to contracts between municipal corporations and their officers operate prospectively only. T.C.A. §§ 6-626, 6-627.

5. Municipal Corporations (Key) 231(1)

Contract will not be invalidated because made with person who became city officer after it was executed unless appointment as city officer was contemplated by parties at time contract was made and was so related to subject matter thereof as to bring it within reason for rule.

6. Municipal Corporations (Key) 231(1)

Notwithstanding charter and statutory provisions with respect to contracts between municipality and its officers, assistant superintendent of education who was elected alderman was entitled to salaries for both offices during term of existing contract, but could not receive salary as assistant superintendent under any contract made thereafter, so long as he continued to serve as alderman.

Todd & Dossett, Kingsport, for appellant.

W. E. Weber, Kingsport, for appellee City of Kingsport.

Hunter, Smith, Davis, Norris, Waddey & Treadway, Kingsport, for appellee Mutual Casualty Ins. Co.

Moore, Stout & Waddell, Kingsport, for appellee Aetna Casualty & Surety Co.

OPINION

For many years prior to 1968, Dr. Elery A. Lay was a teacher with tenure rights employed by the Board of Education of the City of Kingsport. In that year he was elected Assistant Superintendent of Education and assigned to duty as Director of Special Education and Federal Projects Coordinator and on May 20, 1969, he was re-elected to this position for the school year 1969-1970. In June of 1969 he was duly elected to the position of Alderman of the City of Kingsport and was sworn in as an Alderman July 1, 1969, at an annual salary of $250.00.

Conceiving that Dr. Lay might not be eligible to receive compensation for serving in both positions under certain provisions of the City's charter as well as under the common law and statutes of Tennessee, the City of Kingsport alone with Charles K. Marsh, City Manager, and E. Lester Shelor, Recorder-Treasurer, filed their declaration in this case for a declaratory judgment to have determined whether petitioners could safely pay Dr. Lay the salary due him in both positions. The petition named as defendants Dr. Lay and the bonding companies on the respective bonds of petitioners Marsh and Shelor, both of whom, it was alleged, might incur a personal liability in event they should mistakenly perform their official duties requiring them to approve all vouchers issued by the City.

Dr. Lay moved for a dismissal on the ground his right to hold the office of Alderman could only be tested in a quo warranto proceeding and that, to render a declaratory judgment, would not settle and determine the

rights and obligations of all affected parties. This motion was overruled and Dr. Lay then filed an answer denying generally any conflict between the discharge of his duties in the position of Alderman and his duties as Assistant Superintendent of Education or that he was illegally acting in either capacity and consequently could not be denied the emolument of either position.

After a full hearing on oral testimony the Judge of the Law Court ruled that Dr. Lay could not serve concurrently in both positions; that the City and its disbursing agents or officials could lawfully pay Dr. Lay's salary as an Alderman but could not lawfully pay his salary as Assistant Superintendent. We assume this choice was on the theory Dr. Lay's election as an Alderman abrogated his existing contract as Assistant Superintendent of Education.

As we understand, Dr. Lay has not been receiving either salary and has continued to serve in both capacities without receiving any compensation or salary. The City concedes its obligation for one or the other and avows its willingness to pay both salaries if ordered to do so by final court order.

From the judgment of the Law Court Dr. Lay has appealed and assigned errors. The defendant Surety Companies have filed reply briefs submitting their rights to the protection of the Court.

[1] We first direct our attention to the insistence the Court erred in entertaining the suit as a declaratory proceeding. It is our opinion there was no error in this ruling.

As will appear hereinafter and as alleged in the petition there was a real and bona fide controversy based upon substantial grounds as to whether Dr. Lay could

lawfully receive compensation for acting as Assistant Superintendent and at the same time receive his salary as Alderman. The Charter of the City, Article 10, Section 8, imposed upon Recorder-Treasurer Shelor the duty of auditing payrolls, accounts and claims against the City and provides that no claim against the City shall be paid "unless authorized by law". The Recorder-Treasurer acts under the direction of the City Manager who must also sign City vouchers.

The Declaratory Judgment statute, T.C.A. § 23-1103, provides:

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Under the allegations of the petition the liability of the City for salaries due Dr. Lay, was shown to be in doubt. Its disbursing officials under the Charter could not disburse funds of the City "unless authorized by law". If they disbursed funds not authorized by law they and sureties on their official bonds would have incurred a personal liability.

The state of facts alleged in the bill and shown by the proof under the applicable law it seems to us presented a classic case for a judicial declaration of rights and responsibilities of the petitioners.

"It follows, therefore, from the foregoing authorities, that the only controversy necessary to invoke the action of the court and have it to declare rights under our de-

claratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right is invaded or wrong done. The purpose of the act, as expressed in section 12 thereof, is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'" Miller v. Miller, 149 Tenn. 463, 467, 487.

This pronouncement of the Court was reiterated in Williams v. American Plan Corp., 216 Tenn. 435, p. 439, 392 S.W.2d 920. We think the jurisdictional prerequisites above outlined are present in this case and that the suit was properly entertained as a suit for a declaratory judgment unless, as insisted, quo warranto is the exclusive remedy available to petitioners.

[2] It is our opinion it was not necessary for petitioners to proceed by quo warranto. Certainly the disbursing officials were within their rights in asking the Court to determine their duties and obligations in a declaratory proceeding without instituting quo warranto, appropriate only to testing the right of Dr. Lay to hold the office of Alderman. If the Court in a quo warranto proceeding had determined Dr. Lay was entitled to hold that office the question whether, as the Court in this case apparently held, he forfeited his rights under his contract with the Board of Education would have remained unresolved.

It is next insisted that if the present case be held to be within the Declaratory Judgment Act it can not be entertained as such because the Federal and State gov-

ernments furnish a portion of the salary of teachers in the Kingsport school system, including the salary of the Assistant Superintendent, and neither was made a party to this suit. As pointed out in the reply brief this question is being raised for the first time on appeal and, if error, must be considered waived under Rule 12(4) of the Court of Appeals. Additionally, the record shows funds coming from both governments go into the general school fund of the City and are paid out to teachers without regard to the source of such funds. Dr. Lay's contract is with the Board of Education. He receives nothing from the Federal or State government and is not accountable to them in any way.

Turning to a consideration of the merits, it appears the Code of Ordinances, Section 3, Article 20, of the City of Kingsport provides:

"Section 3, Article 20, Municipal officers, employees not to contract with city.—No member of the board of mayor and alderman nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged."

The bill refers also to the following statutes:

"*T.C.A. 6-626. Contracts with officers prohibited.*—No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly."

"*T.C.A. 6-627. Liability of Officer contracting.*—Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name."

We find there are conflicting duties and responsibilities in the two positions. In his position with the schools the assistant superintendent assists at the administrative level in making up the annual school budget including expenditures relating to the Federal projects. When completed the budget is submitted to the Board of Education which after considering the recommendations of the Superintendent approves a budget and submits it to the Board of Mayor and Aldermen. This recommended budget includes a lump sum for salaries of the Superintendent and his assistant and other supervisory personnel, as well as the salary of the teaching staff. As an Alderman it is the duty of Dr. Lay to review the budgeted items which as Assistant Superintendent he had a part in formulating. Indirectly if not directly he has a personal interest in the amount approved for salaries and it is only natural that, as Alderman, he will favor the approval of budgeted items pertaining to the projects with which he is personally involved as Assistant Superintendent.

The ordinance and the statutes are directed against all conflicting interests, not solely those involving the monetary interests of the municipality or its officers. Try as he might a person charged with the duties of both positions could not disassociate the duties of one from the duties of the other. Over and beyond this it is important that the public business be free from the taint of suspi-

cion. The record shows Dr. Lay to be a man of probity and unimpeachable character. We are dealing here, however, with the mandate of the law which has as its salutary purpose the protection of the general public interest.

In State ex rel. v. Yoakum, 43 Tenn.App. 123, 306 S.W.2d 39, we said:

"These statutes were enacted more than one hundred [100] years ago. In their application our courts have consistently upheld their salutary spirit and purpose and we have no disposition to weaken their effect or recede from the strictness with which they have been applied."

We consider it of no consequence that Dr. Lay is a teacher protected by tenure. His position as Assistant Superintendent is none the less a contract with the City, through its arm, the Board of Education. Under the circumstances it falls within the purview of the ordinance and the statutes. (We do not understand the City is insisting Dr. Lay has lost his tenure status as a teacher.)

[3, 4] We agree with the general holding of the trial judge that the ordinance and the statute are applicable and denounce the holding of the two positions by one person. We can not agree, however, that the contract for the year 1969-1970, made before Dr. Lay became a member of the Board was abrogated by his subsequent election as an Alderman. The rights of the parties are to be judged as of the date of the contract. The Board to which Dr. Lay was elected could not by any action it might choose to take add to or subtract from either the duties fixed by the contract or the compensation to which Dr. Lay is entitled under it. The contract for that year, therefore, does not fall within the ban either of the ordinance or of the statutes which we hold operate prospectively—not retroactively.

[5] "A contract will not be invalidated because made with a person who became a city officer after it was executed unless his appointment as city officer was contemplated by the parties at the time the contract was made and was so related to the subject matter thereof as to bring it within the reason for the rule." 63 C.J.S., Municipal Corporation, § 992, p. 559, citing in the footnotes; Beaudry v. Valdez, 32 Cal. 269; Koons v. Richardson, 227 Ill.App. 477; See also Heffernen v. Green Bay, 266 Wis. 534; 64 N.W.2d 216; McQuillin, Municipal Corporations, 1966 Revision, Section 29.98.

[6] The effect of our holding is that so long as Dr. Lay remains an Alderman he can not be paid any sum as salary under any contract made with the Board of Education after the school year 1969-1970. For that year he is entitled to be paid both salaries.

As so modified the judgment is affirmed. Costs of the Law Court were taxed to petitoners. Costs of this Court will be taxed to the City of Kingsport.

COOPER and PARROTT, JJ., concur.